

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KYLE AVERY,
CDCR #E-67897,

vs.

D. PARAMO, et al.,

Plaintiff,

Defendants.

Case No. 13cv2261 BTM (DHB)

**ORDER PROVIDING PLAINTIFF
NOTICE OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT RE FAILURE TO
EXHAUST ADMINISTRATIVE
REMEDIES**

Plaintiff Kyle Avery is a state prisoner proceeding *pro se* in this civil rights action filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983.

Defendants have filed a pre-answer motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 and *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc) (Doc. No. 32). In their Motion, Defendants argue that Plaintiff has failed to exhaust all available administrative remedies as to his retaliation claims prior to filing this lawsuit, as required by the Prison Litigation Reform Act (“PLRA”). *See* 42 U.S.C. § 1997e(a); Defs.’ Mot. at 6.

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1 “The PLRA mandates that inmates exhaust all available administrative remedies
 2 before filing “any suit challenging prison conditions,” including, but not limited to,
 3 suits under § 1983.” *Albino*, 747 F.3d at 1171, *citing Woodford v. Ngo*, 548 U.S. 81,
 4 85 (2006). “Exhaustion should be decided, if feasible, before reaching the merits of
 5 a prisoner’s claim.” *Id.* at 1170. The Ninth Circuit has held that “the appropriate
 6 procedural device for pretrial determination of whether administrative remedies have
 7 been exhausted under the PLRA . . . is a motion for summary judgment under Rule 56.”
 8 *Id.* at 1168.

9 Accordingly, Plaintiff is hereby provided with notice that Defendants have asked
 10 the Court to find, as a matter of law, that he failed to exhaust administrative remedies
 11 as to his claims of retaliation pursuant to 42 U.S.C. § 1997e(a). Plaintiff is further
 12 advised of his opportunity to include in his Opposition to Defendants’ Motion
 13 whatever arguments and documentary evidence he may have to show that he did, in
 14 fact, exhaust all administrative remedies related to his claims of retaliation as were
 15 available to him prior to filing suit. *See Marella v. Terhune*, 568 F.3d 1024, 1028 (9th
 16 Cir. 2009) (a district court must “effectively give [plaintiff] fair notice that he should
 17 have submitted evidence regarding exhaustion of administrative remedies”). The Court
 18 cautions Plaintiff that if he does not submit his own evidence in opposition, summary
 19 judgment as to his retaliation claims, if appropriate, may be entered against him. If
 20 summary judgment as to his retaliation claims is granted, those claims will be
 21 dismissed and there will be no trial on the merits as to those claims.

22 Defendants’ Motion is set for hearing on **Friday, October 24, 2014**, at 11 a.m.
 23 in Courtroom 15B. Accordingly, Plaintiff must file an opposition to Defendants’
 24 Motion and serve it upon Defendants’ counsel of record no later than **Friday, October**
 25 **10, 2014**. Defendants may file a reply no later than **Friday, October 17, 2014**. At the
 26 time set for hearing, the Court will consider the matter fully briefed as submitted on the
 27 papers and will issue a written Order in due course.

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1 Unless otherwise ordered, no appearances are required on October 24, 2014, and
2 no oral argument will be held on that date. *See* S.D. CAL. CIVLR 7.1.d.1.

3 **IT IS SO ORDERED.**

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5 DATED: 9/9/2014

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7 HON. BARRY TED MOSKOWITZ, Chief Judge
8 United States District Court
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